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ALEXANDER L. STEVAS,

No. 81-1036

In the Supreme Court of the United States

October Term, 1981

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Petitioners,

vs.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I

INTRODUCTION

The Respondent grain companies have filed with this Court a brief that is less than straightforward.* With their

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*Bunge Corporation did not join in Respondents' brief. On January 4, 1982, Bunge wrote the Court as follows: "Bunge Corporation opposes the granting of a writ of certiorari in the captioned matter, but does not intend to file a brief in opposition to same unless requested by the Court."

brief, tainted by the excessive zeal of advocacy, the grain companies seek to protect the antitrust immunity granted to them by the lower court. As this case presently stands, the Respondent international grain companies are free to engage in activity designed to keep depressed the price that farmers receive for their wheat. All food processors, one level removed from farmers, will surely follow the lead of the grain companies in setting the prices that farmers receive for their produce.

Legalized price fixing is what the Respondents seek. If a farmer, against whom the price fixing conspiracy is directed, is denied standing under the antitrust laws, there is legalized price fixing. A farmer, selling his farm produce at prices depressed by a conspiracy at any level of the distribution chain, has no way to pass on the loss. It rests with him. One cannot seriously advocate that this is the result intended by this Court with *Illinois Brick Co. v. Illinois,* 430 U.S. 720 (1977). A seller case, particularly when the seller is a farmer, does not seem to fit the rationale or purpose of *Illinois Brick.*

Contrary to the misstated question posed by Respondents, the Petitioner is not asking this Court to reconsider or overturn *Illinois Brick.* Petitioner seeks only to have this decision rationally applied to carry out the purpose intended by this Court. With *Illinois Brick,* this Court never intended that it be applied to grant the Respondent grain companies an immunity from liability under the antitrust laws. This Court has never favored exceptions to nor immunity from the federal antitrust laws, especially when price fixing is involved.

This Court's most recent pronouncement against judicially created exceptions to the antitrust laws is *Community Communications Company, Inc. v. City of Boulder, Colorado,* ..... U.S. ....., 50 L.W. 4144 (1982). In that

case, this Court refused to extend state immunity to a "home rule" municipality. Concerning the argument by the City of Boulder, this Court stated:

> ". . . this argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws. Those laws, like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." 50 L.W. at 4148.

It would be strange to refuse an antitrust exception to a political subdivision of the State of Colorado and to make an exception for Respondents' agreement and conspiracy against American wheat farmers. This was never the intent of *Illinois Brick*. And until this present case, no other court has ever placed an interpretation on *Illinois Brick* so that a price conspiracy is immunized from a challenge under the antitrust laws.

II

CONTRARY TO THE CLAIMS OF RESPONDENTS, THE DECISION BELOW CREATES CONFLICT AMONG THE CIRCUITS; AND IT IS INCONSISTENT WITH THE LANGUAGE AND RATIONALE OF ILLINOIS BRICK

In light of the authorities discussed in the Petition filed in this case, it is difficult to understand how the Respondents can deny the presence of a conflict among Circuits on the issue of standing under the antitrust laws of persons directly injured as a result of a price fixing conspiracy. Subsequent decisions make the conflict even clearer. Wheat farmers, in the present case, were denied standing in spite of the fact that they were the very target of Respondents' price fixing conspiracy.

But wheat farmers, in *McCarty Farms, Inc. v. Burlington Northern, Inc.*, 91 F.R.D. 486 (D. Mont. 1981), were granted standing even though they were "one commercial transaction removed". This is a direct conflict with the holding in the present case. Although *McCarty* was filed under the Interstate Commerce Act, the standing of wheat farmers to raise claims of unreasonable freight rates was decided on the basis of *Illinois Brick*. Arguments of the railroad, very similar to the arguments of the Respondents, were explained by the court as follows:

> "The defendant premises its contention on the fact that the plaintiff-wheat growers were one or more commercial transactions removed from the transportation contracts. Since this position forces the plaintiff-wheat growers to establish that the alleged overcharge was in fact passed-on to them from the elevator operators, the defendant-railroad submits that the decisions of the United States Supreme Court regarding the utilization of the concept of 'pass-on' in damage suits for alleged antitrust violations, dictate that the plaintiff-wheat growers in the case at bar lack individual standing." 91 F.R.D. at 487.

The court rejected the argument that *Illinois Brick* compelled denial of standing to wheat farmers simply because the farmers were "one commercial transaction removed from the transportation contracts at issue". In a well reasoned opinion, fully recognizing *Illinois Brick*, the lower court in *McCarty Farms* ruled that the wheat farmers had standing since there was no serious risk of multiple liability nor any increased complexity involving the tracing of complex economic adjustments. 91 F.R.D. at 491.

Consistent with *McCarty Farms* in the application of *Illinois Brick* is *In Re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287 (D. Md. 1981). There, the court

reasoned that *Illinois Brick* should not be blindly and mechanically applied. Instead, *Illinois Brick* was applied in light of its underlying policy objectives. 516 F. Supp. at 1295. The court in *Toyota* stated:

> "This Court does not consider it fruitful to undertake an overly semantic analysis of the co-conspiracy exception; what is useful instead is to review the allegations in light of the policy objectives underlying *Illinois Brick*. If those policy considerations argue for application of the *Illinois Brick* rule, it will be applied, if they do not, it will not. A review of the instant pleadings from this perspective reveals that the *Illinois Brick* policy factors have no application here." 516 F. Supp. at 1295.

In *Toyota*, the court found no risk of duplicative recovery; nor did it find any "tracing complexities". 516 F. Supp. at 1295. Consequently, the court reasoned that *Illinois Brick* did not apply. The court stated:

> ". . . when the reasons for the rule do not apply, application of the rule would be plainly inappropriate." 516 F. Supp. at 1293.

A similar conclusion was reached in *McCready v. Blue Shield of Virginia*, 649 F.2d 228, 231 (4th Cir. 1981).

Most courts have applied *Illinois Brick* in accordance with the reasons and policy expressed by this Court. Legal commentators have considered *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) to be in this category. See: Note, Antitrust Law - In Re Beef Antitrust Litigation: A Crack Appears in the Illinois Brick Wall, 1981 Wis. L.Rev. 185; Note, A Door in the Illinois Brick Wall - A Functional

Equivalent to the Cost-Plus Contract Exception, 33 Vand. L.Rev. 481 (1980).

The Tenth Circuit has isolated itself from other courts with its interpretation and application of *Illinois Brick*. This interpretation carves out a special exception to the anti-trust laws for the Respondent grain companies and all future food processors who are one step removed from farmers. With their present brief, the Respondent grain companies are planning ahead to extend this immunity against claims filed even by the wheat farmers who were direct sellers.

Based on the footnote appearing on page 10 of their brief, the grain companies suggest that if this Court denies certiorari in this case, the remaining claims of "direct sellers" can be prosecuted only in "individual actions". This footnote shows clearly the Respondent grain companies' total lack of regard for the rights of the relatively small Oklahoma wheat farmers. Regardless of the number of Oklahoma wheat farmers who were direct sellers, the grain companies are setting the stage for the argument that the class action device is not available to these farmers.

The Respondent grain companies have overlooked nothing in their joint effort to avoid liability even to the extent of making misleading and erroneous statements. They claim that the Petitioners "do not quarrel with the principle that *Illinois Brick* applies equally to sellers' claims". (Respondents' Brief, pg. 14.) This is incorrect. One of the very reasons that this Court should accept review of this case is to consider the application of *Illinois Brick* to seller cases. There is a significant difference between purchasers and sellers. This difference presents a question worthy of this Court's attention, particularly in

the factual setting of the present case where application of *Illinois Brick* to farmers creates an absolute immunity in favor of the grain companies.

On the other hand, if the wheat farmers are granted standing, there is absolutely no risk of duplicate recovery. The wheat farmers are seeking to recover damages on the basis of wheat sold on the open market during a specified period of time. Prices received for this wheat were depressed as a direct result of the conspiracy of the Respondent grain companies. No person other than the farmers could have suffered any injury as a result of the conspiracy.

Grain elevators might have suffered their own losses for wheat held in storage during the time of the alleged conspiracy; however, these elevators could not have suffered any loss on wheat sold by the farmers during the time of the conspiracy. In fact, the grain elevators would have benefited from the depressed prices caused by the conspiracy. Except for the action filed by the farmers, the Respondent grain companies are free to retain the fruits of their illegal conspiracy. But worse, they are free to continue their conspiratorial activity against farmers.

III

THE MERITS OF THIS CASE ARE NOT BEFORE THIS COURT

In an effort to cloud the question presented to this Court, the Respondents unfairly seek to discredit the merits of the antitrust claims of the Oklahoma wheat farmers. Almost one-half of their brief is devoted to discredit the merits when that matter is not even before this Court. With the degree of deception in Respondents' brief, the zeal of advocacy has exceeded appropriate limits.

It is claimed that two Congressional committees exonerated the Respondent grain companies. (Respondents' Brief, pg. 3.) This is false. It is claimed by Respondents "That evidence establishes that there is no basis for the charges contained in the petitions and that Petitioners' claims on the merits rest upon unsupported allegations and innuendo". (Respondents' Brief, pg. 4-5.) This also is false. Respondents filed a motion for summary judgment on the merits of this case; however, this motion was denied.

Respondents suggest that they made no profits on the sale to Russia. (Respondents' Brief, pg. 6.) This is false. It is further suggested that the charges against Respondent Clarence Palmby are "scandalous" and "utterly undocumented and unfounded". (Respondents' Brief, pg. 6.) Petitioner agrees that the charges are "scandalous"; however, he disagrees that the charges are undocumented.

It can be documented that Mr. Palmby, as Assistant Secretary of Agriculture, was holding private meetings with high officials of Continental Grain Company at the very time he was representing the United States in negotiations with the Russians. Palmby even purchased an expensive New York apartment with the assistance of several of Continental Grain's top officers just a few days before traveling to Moscow to represent the American people.

It is clear from the evidence that Clarence Palmby sold out the American wheat farmers. But Petitioner resists Respondents' invitation to further argue the merits of the case. The Oklahoma wheat farmers seek only the opportunity to present their claim and evidence to a court of law. They have been injured as a direct result of the price fixing conspiracy of Respondents. They deserve their day in court.

For these reasons, the Oklahoma wheat farmers urge this Court to grant certiorari and to reverse the lower court decision.

Respectfully submitted,

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